IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In Re: TYSON FOODS, INC SECURITIES LITIGATION)))))	Civil Action No. 01-425-SLR

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MEMORANDUM OPINION

Wilmington, Delaware
Dated: October 6, 2003

ROBINSON, Chief Judge

I. INTRODUCTION

Pending before the court is a motion for class certification (D.I. 62) filed by Aetos Corporation ("Aetos"), Pelican Limited Partnership ("Pelican"), Stark Investments, L.P. ("Stark"), and Shepherd Investments International, Ltd. ("Shepherd") (collectively the "Lead Plaintiffs"). (D.I. 62) By their motion, Lead Plaintiffs move this court to certify a class defined as all persons and entities (excluding defendants, members of the immediate families of and persons affiliated with each defendant, the legal representatives, heirs, and successors and assigns of any of the defendants) who purchased IBP, Inc. ("IBP") securities on or before March 29, 2001, and subsequently sold those securities during the period from March 30, 2001 through June 15, 2001, inclusive, and who sustained damages as a result of such transactions (the "Proposed Class"). In addition, Lead Plaintiffs request the court to enter an order appointing Lead Plaintiffs as Class Representatives and Duane Morris L.L.P., Abbe Gardy L.L.P., and Quarles & Brady L.L.P. as Class Counsel. For the reasons discussed, the court will grant Lead Plaintiffs' motion.

II. BACKGROUND

This is a securities fraud class action brought under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j and 77t, and Rule 10b-5 promulgated by the Securities and Exchange Commission ("SEC"). (D.I. 1) Lead Plaintiffs seek to maintain this class action pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Proposed Class.

This case stems from the aborted merger between Tyson Foods, Inc. ("Tyson") and IBP. The details of that merger are laid out in great detail in <u>In re IBP Shareholders Litigation</u>, 789 A.2d 14 (Del. Ch. 2001). IBP is the nation's largest beef distributor and second largest pork distributor. Tyson is the nation's largest chicken distributor. On January 1, 2001, Tyson and IBP entered into a merger agreement, whereby IBP shareholders were to receive cash or shares in Tyson in exchange for their IBP shares. Thereafter, Tyson's largest shareholder began to have buyer's remorse, based on economic downturns affecting both companies. At that time, IBP's subsidiary, DFG, Inc., was under SEC investigation for accounting discrepancies. Tyson was aware of this SEC investigation prior to the signing of the merger agreement. On March 29, 2001, Tyson issued a press release and letter claiming that it had been fraudulently induced into the merger agreement. That March 29 letter and press release are the basis for this action. Plaintiffs allege that the press release and letter (1) contained false information about IBP and Tyson's planned merger, and (2) omitted material information concerning

Tyson, IBP and their planned merger. According to the complaint, the press release and the letter falsely state that Tyson's reason for terminating the merger stemmed solely from recent developments in the SEC investigation. (D.I. 63 at 7-8) Further, Tyson falsely claimed that IBP had inappropriately induced Tyson to enter the merger agreement, based upon IBP's representation of the SEC investigation. (Id.) The falsity of these statements were the subject, in part, of the litigation in the Delaware Court of Chancery. See In re IBP, 789 A.2d at 72.

The market sharply reacted to Tyson's announcement, with IBP's common share price dropping from $27.79 per share at the close of business on March 29, to a low of $15 on March 30, 2001. The price of IBP's stock continued to fall as low as $14.50 per share on April 9, 2001. Plaintiffs allege that the negative effect on the market for IBP shares was not corrected until June 15, 2001, when Vice Chancellor Strine ordered specific performance of the merger agreement and issued an opinion determining that Tyson had not relied upon misleading information and that Tyson had not been inappropriately induced. (D.I. 63 at 10 (citing In re IBP, 789 A.2d at 14))

On June 22, 2001, the first of several class actions were filed against Tyson, IBP, Don Tyson (Tyson's Chairman, President and Chief Executive Officer) and Les Baledge (Tyson's Executive Vice President and General Counsel). (D.I. 1) On September 20, 2001 this court consolidated these cases pursuant to the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (codified at various sections of 15 U.S.C.), and named Aetos, Pelican, Stark and Shepherd as Lead Plaintiffs.

Lead Plaintiffs are hedge funds which engage in merger arbitrage. Aetos and Pelican are funds managed by Arbhold & S. Bleichroder Advisers, Inc., an international banking firm headquartered in New York City. Stark and Shepherd are funds managed by Staro Asset Management, LLC which is headquartered in St. Francis, Wisconsin. Each of the Lead Plaintiffs engages in a short-term higher-risk investment strategy known as merger arbitrage, in which arbitragers target corporations for whom they believe the market price does not reflect an accurate valuation of a potential merger. (D.I. 83 at 23-24) Lead Plaintiffs jointly lost in excess of $20 million in connection with their trading in IBP shares during the proposed class period.

Lead Plaintiffs filed this consolidated class action complaint on December 4, 2001. (D.I. 11) On January 22, 2002, defendants moved for dismissal of the complaint. On October 23, 2002, this court, following full briefing and oral argument, granted in part and denied in part defendants' motion to dismiss, finding that two of the statements by Tyson were potentially actionable under federal securities law. (D.I. 25 at ¶ 14) On February 23, 2003, Lead Plaintiffs moved this court for an order to certify the proposed class.

III. STANDARD FOR CLASS CERTIFICATION

A party seeking to certify a class bears the burden of establishing that the requirements of Federal Rule of Civil Procedure 23 are met. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997). First, a moving party must show that all four requirements of Rule 23(a) are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The moving party must also demonstrate that at least one of three additional requirements under Rule 23(b) is met. In this case, Lead Plaintiffs assert that, pursuant to Rule 23(b)(3), common questions of law and fact predominate and the class action is a superior method for a "fair and efficient adjudication of the controversy." Id. at 23(b)(3).

IV. DISCUSSION

A. The Requirements of Rule 23(a)

1. Numerosity

To be certified, a class must be "so numerous that joinder of all the parties is impracticable." Fed. R. Civ. P. 23(a)(1). The defendants have not objected to the certification of the class on this ground. (D.I. 83) In the present case, there were well over one hundred million shares of IBP common stock publicly traded during the class period. Without appropriate discovery, the exact size of the class cannot be determined, but it may certainly number in the thousands. The court finds that the numerosity requirement is satisfied.

2. Commonality and Predominance

The requirement of commonality insures that class members share at least a single common issue. See Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). Predominance requires that the issues common to the class predominate over those issues affecting only individuals. Fed. R. Civ. P. 24(b)(3). The Third Circuit "requires that commonality and predominance be analyzed together, because the predominance requirement, which is 'far more demanding,' incorporates the commonality requirement." In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 247 (2002) (Robinson, C.J.) (quoting In re LifeUSA Holding, Inc., 242 F.3d 136, 144 (3d Cir. 2001)). In this case, the common legal and factual issues are: (1) whether the federal securities laws were violated by the defendants; (2) whether representations made to the investing public and IBP shareholders during the Class Period omitted and/or misrepresented material facts about defendants' decision to terminate the planned merger; (3) whether defendants failed to disclose material facts necessary to not mislead the investing public; and (4) whether the members of the Proposed Class have sustained damages and what the measure of those damages should be. Consequently, the real inquiry is whether any individual issues predominate over these common legal and factual issues. Put another way, is the proposed class "sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623.

As a matter of general applicability, the Supreme Court has suggested that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." Id. at 625. A securities fraud action, based upon false and misleading statements to the market, is a prototypical class action claim. See, e.g., Semerenko v. Cendant Corp., 223 F.3d 175 (3d. Cir. 2000) (financial statement); Weiner v. Quaker Oats Corp., 129 F.3d 310 (3d. Cir. 1997) (corporation's financial condition); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) (projected future earnings); In re

Westinghouse Sec. Litig., 90 F.3d 696 (3d Cir. 1996) (stock offering). The Third Circuit has held that "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" Eisenberg v. Gagnon 766 F.2d 770, 785 (3d Cir. 1985) (quoting Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.)(1970)).

Tyson contends that Lead Plaintiffs have not satisfied the predominance requirement of Rule 23(b)(3) because individual issues of reliance will predominate over other elements of the case. Tyson contends in this regard that the length of the proposed class period and the possible change in materiality of the March 29 statements by Tyson will make individual issues of reliance more pronounced and less amenable to class resolution.

Tyson largely relies on Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172-73 (3d Cir. 2001), for the proposition that individualized issues of reliance may preclude class action. In that case, the alleged misconduct related to the "broker-dealer accepting an investor's order under the implied representation of the duty of best execution." Id. at 173. The Third Circuit affirmed the trial court's decision to not certify the class because the type of claim being asserted did not satisfy Rule 23's commonality and predominance requirements. In particular, the Court of Appeals held that while the plaintiffs were entitled to the presumption of reliance, the kind of claim--duty of best execution--did not invoke a presumption of class-wide economic loss. Id. at 181. In doing so, the Third Circuit specifically distinguished the best execution duty from those more garden-variety claims which "involve a fraudulent material misrepresentation or omission that affects a security's value." Id. at 173. Unlike Newton, this case at its heart alleges that the defendants' false or misleading statements decreased the value of a security. See id. at 180.

The defendants contend the Lead Plaintiffs are not entitled to the fraud-on-the-market presumption and, as such, individual issues of reliance will predominate over the class action. However, it is settled law that issues of individual reliance will not defeat class certification. Eisenberg, 766 F.2d. at 786; Newton, 259 F.3d at 154; In re Honeywell Int'l. Inc., Sec. Litig., 211 F.R.D. 255, 266 (D.N.J. 2002); Snider v. Upjohn Co., 115 F.R.D. 536, 541 (E.D. Pa. 1987); In re Data Access Sys. Sec. Litig., 103 F.R.D. 130, 147 (D.N.J. 1984) rev'd on other grounds, 843 F.2d 1537 (3d Cir. 1988). It is premature to determine whether the fraud-on-the-market presumption may be invoked by Lead Plaintiffs at this time. To hold otherwise would result in the conclusion in nearly every securities fraud case that class certification is not proper as defendants would always seek to show that lead plaintiffs' individual reliance will be the overriding issue. Eisenberg, 766 F.2d at 786.

This court finds the defendants' argument pertaining to the length of the class period to be equally uncompelling. Defendants argue that, over the course of the eleven weeks of the proposed class period, the available information in the market place changed so substantially that the materiality of the alleged misleading statements is called into question. The defendants argue that Klein v. A.G. Becker Paribas Inc., 109 F.R.D. 646 (S.D.N.Y. 1986), stands for the proposition that the class period is "too long and too disparate to permit certification." (D.I. 83 at 32) In Klein, however, the district court granted class certification, but limited it to a period between when the first alleged misleading statement occurred and when the corporation issued what could be construed as a curative statement. Klein, 109 F.R.D. at 652. In any market, there is a continuing influx of information which, directly or indirectly, affects the materiality of a particular statement. Consequently, courts have been reticent to reject class certification on the basis of timing. See e.g., Kinney v. Metro Global Media, Inc., 170 F. Supp. 2d 173, 181 (D.R.I. 2001); In re Oxford Health Plans Inc., 191 F.R.D. 369, 377 (S.D.N.Y. 2000); In re Miller Indus. Inc. Sec. Litig., 186 F.R.D. 680, 687 (N.D. Ga. 1999); Welling v.

Alexy, 155 F.R.D. 654, 662 (N.D. Cal. 1994). The defendants argument, taken to its logical conclusion, would necessitate the exclusion of nearly any class extending beyond a single day or two, if not shorter.

Therefore, the court finds that the commonality and predominance requirements are satisfied. In this case, there are common questions of law and fact that are paradigmatic of a securities fraud class action. See In re DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 297 (D. Del. 2003) (Farnan, J.). Consequently, while there may be individualized issues that speak to both defenses and damages, the plaintiff class is united by claims under the same laws and based on the same conduct by the defendants.

3. Typicality

Rule 23(a)(3) requires that claims or defenses of the named class representatives be "typical of the claims or defenses of the class." The purpose of the typicality requirement is to insure that representative plaintiffs' interests are aligned with the interests of the class. See In re Prudential Ins. Co of America Sales Practices Litig., 148 F.3d 283, 311 (3d Cir. 1998). "Typicality lies where there is a strong similarity of legal theories ... or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant." In re Prudential Ins. Co. of America, 962 F.

Supp 450, 518 (D.N.J. 1997) (internal citation omitted).

Tyson contends that Lead Plaintiffs do not satisfy the typicality requirements of Rule 23(a) for three reasons: (1) Lead Plaintiffs did not believe the alleged misstatements and would have sold their IBP shares notwithstanding those statements; (2) Lead Plaintiffs have an "idiosyncratic interpretation" of Tyson's March 29 statements, which precludes their individual reliance on the fraud-on-the-market presumption; and (3) Lead Plaintiffs did not rely on the integrity of the market price of IBP stock. Each of these arguments, however, is essentially directed at the extent to which Lead Plaintiffs relied on the March 29 statements and the extent to which that reliance was reasonable.

The fundamental concern of typicality is insuring that Lead Plaintiffs' interests are aligned with the class they represent; it is not required that Lead Plaintiffs' interests be identical to that of the class they represent or that Lead Plaintiffs have identical theories of recovery. In this case, the claims of Lead Plaintiffs and of the Proposed Class stem from the same operative facts and the same provisions of federal law. The extent to which Lead Plaintiffs may be entitled to the presumption of reliance under the fraud-on-the-market theory or, alternatively, the extent to which they relied on the alleged false statements of the defendants goes to the merits of the case and is not dispositive at this time. Zeffiro v. Pennsylvania Bank & Trust

Co., 96 F.R.D. 567, 569-70 (E.D. Pa. 1983) ("[P]articular factual differences, differences in the amount of damages claimed, or even the availability of certain defenses against a class representative may not render his or her claims atypical.").[1]

This court concludes that the Proposed Class claims are typical within the meaning of Rule 23 as they share the same operative facts and legal theories.

4. Adequacy of Representation

Rule 23(a)'s adequacy requirement tests the "qualifications of the counsel to represent the class" and whether there are

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[1] The fraud-on-the-market presumption "obviates the need to prove subjective reliance in open market transactions since the market interposed between the buyer and the seller." Moskowitz v. Lopp, 128 F.R.D. 624, 630 (E.D. Pa. 1989). The presumption has three components: "First, the court presumes that the misrepresentation affected the market price. Second, it presumes that a purchaser did in fact rely of the price of the stock as an indication of its value. Third, it presumes the reasonableness of the reliance." Id. at 630 (citing Zlotnick v. Tie Communications, 836 F.2d 818, 822 (3d Cir. 1988)). This presumption may be rebutted by showing either that the statements did not affect the market price or that the plaintiff would have "made the purchase regardless of the undisclosed information." Id. (citations omitted); see also Basic v. Levinson, 485 U.S. 224, 249 (1988); Moskowitz, 128 F.R.D. at 631 ("The fact that these traders have divergent motivations in purchasing shares would not defeat the fraud-on-the-market presumption absent convincing proof that price played *no* part whatsoever in their decision making.").

In this case, each of the defendants' arguments regarding typicality goes to whether Lead Plaintiffs are entitled to the fraud-on-the-market presumption. This is an issue on the merits, and a defense hardly unique to Lead Plaintiffs. "Exactly what plaintiff relied on in purchasing and selling his shares ... is a question of fact which can not be resolved at the class action stage." Moskowitz, 128 F.R.D. at 631 (citing Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78 (1974)).

"conflicts of interests between named parties and the class they seek to represent." In re Prudential, 148 F. Supp at 313 (internal citations omitted); see also Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 238, 247 (3d Cir. 1975).

Defendants challenge the adequacy of representation based upon the alleged presence of conflicts of interest between Lead Plaintiffs and members of the Proposed Class. Defendants broadly conclude that Lead Plaintiffs are unsuited to represent the interests of the Proposed Class because Lead Plaintiffs made their decision to dispose of their holdings in IBP at an early point during the Proposed Class Period. (D.I. 63 at 36-37) However, the defendants fail to identify the presence of a real intraclass conflict not otherwise found in securities fraud claims. This court finds that Lead Plaintiffs have a strong interest in establishing liability under federal securities law, and that they seek similar damages for similar injuries. Consequently, the court concludes that Lead Plaintiffs' interests are not in conflict with those of the Proposed Class, and that they will serve as adequate representatives.

This court also concludes that Lead Plaintiffs' counsel are qualified to represent the class, and that there are no conflicts of interest between Lead Plaintiffs and the Proposed Class that renders the Lead Plaintiffs inadequate to represent the class.

B. The Requirements of Rule 23(b)

1. Superiority

The superiority requirement directs the court to "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." In re Prudential, 148 F.3d at 316. Rule 23(b)(3) sets out several factors to be considered in this regard, including:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 26(b)(3). In determining issues of class certification, "the interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing a class action." Kahan, 424 F.2d at 169 (quoting Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968)).

Defendants contends that the sophistication of Lead Plaintiffs cuts against a finding that a class action is a superior forum for resolving these claims. (D.I. 83 at 34) This argument, however, is in conflict with the express intent of Congress to favor institutional investors, who by their very nature are likely to have sophisticated investment strategies. See 15 U.S.C. § 77z-1(b) (2001). Federal securities laws do not protect investors any differently, and certainly no less, simply because they engage in more complicated investment strategies. See Deutschman v. Beneficial Corp., 841 F.2d 502, 507-08 (3d Cir. 1988).

The court finds that the factors enumerated in Rule 23(b)(3) militate in favor of the conclusion that a class action is superior to other available methods of litigating the claims. There are potentially thousands of claimants with varying degrees of injury. "The class action device is especially appropriate in securities fraud cases, such as this one, wherein there are many individual plaintiffs who suffer damages too small to justify a suit against a large corporate defendant." Deutschman v. Beneficial Corp., 132 F.R.D. 359, 378 (D. Del. 1990).

V. CONCLUSION

For the reasons discussed above, the court concludes that Lead Plaintiffs have met the requirements set forth in Rule 23, and that certification of the Proposed Class is proper.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In Re: TYSON FOODS, INC SECURITIES LITIGATION	)))))	Civil Action No. 01-425-SLR

O R D E R

At Wilmington this 6th day of October 2003, Lead Plaintiffs having established that class certification under Fed. R. Civ. P. 23 is proper;

IT IS ORDERED that:

1. A Class, defined as all persons and entities (excluding defendants, members of the immediate families of and persons affiliated with each defendant, the legal representatives, heirs, and successors and assigns of any of the defendants) who purchased IBP, Inc. ("IBP") securities on or before March 29, 2001, and subsequently sold those securities during the period from March 30, 2001 through June 15, 2001, inclusive, and who sustained damages as a result of such transactions, is hereby certified.

2. Aetos Corporation, Pelican Limited Partnership, Stark Investments, L.P., and Shepherd Investments International, Ltd. are hereby appointed as Class Representatives.

3. Duane Morris L.L.P., Abbe Gardy L.L.P., and Quarles &

Brady L.L.P. are hereby appointed as Class Counsel.

Sue L. Robinson
United States District Judge